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(3)

No. 08-1137

In the
Supreme Court of the United States

ENTEC CORPORATION, ET AL.
Petitioners,

v.

CENTRO DE RECAUDACIÓN DE INGRESOS MUNICIPALES
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PUERTO RICO

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

This Petition is a belated attempt to review a decision of the Court of First Instance of the Commonwealth of Puerto Rico (hereinafter, at times, CFI), which became final and unappealable because petitioners failed to appeal it within the jurisdictional time period provided by the Commonwealth of Puerto Rico's Rules of Civil Procedure.

As it will be fully developed herein; the instant petition should be denied because Petitioner's failure to timely appeal the judgment issued by the CFI to the intermediate Commonwealth's Court of Appeals and, thus, to the Supreme Court of Puerto Rico, made the judgment final and unappealable which, in turn, operates as *res judicata* with regard to all questions presented in this Petition for Certiorari. Furthermore, this Honorable Court is deprived of jurisdiction to entertain this petition, under 28 U.S.C. § 1258, given that there is no final judgment rendered by the Supreme Court of Puerto Rico as the judgment entered in the case became final and unappealable on January 12, 2006, *infra*.

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RESPONDENT'S STATEMENT OF THE CASE

On July 20, 1995, petitioners Entec Corporation ("Entec"), Consulta Económica y Planificación, Inc. ("CEPI") and Héctor L. Rivas & Associates ("HLRA"), jointly hereinafter the Consortium, executed an agreement with Respondent Centro de Recaudación de Ingresos Municipales ("CRIM"). CRIM was created by virtue of Commonwealth Law 80 dated August 30, 1991 as "[a] municipal entity, independent and separate from any other agency or instrumentality of the Commonwealth of Puerto Rico". It is the "fiscal services entity whose primary responsibility [is] to collect, receive and allocate the public funds arising from the sources indicated in [the law] and which corresponds to the municipalities." 21 L.P.R.A. sec. 5802. CRIM is entrusted, among duties relevant to this case, with the "[c]ollect[ion] [of] the property taxes . . . corresponding to each municipality", as well as "keeping up to date and updating the official record of real estate of each municipality, and improving and rendering more efficient the billing and collection systems of said taxes". 21 L.P.R.A. sec. 5803.

The Consortium agreed to design, develop and implement a digitalized land register system known as the Land Information Management System ("LIMS"). The LIMS contract was executed by CRIM, represented by its then Executive Director Mr. Eduardo Burgos. Pet. App. 260A. In August 2000, five years after the LIMS contract was signed and after more than $50 million had been disbursed to the Consortium, the U.S. Attorneys'

Office indicted 18 individuals charging them with federal felonies for, among others, violations of the Hobbs Act, 18 U.S.C. sec. 1951, et al., and perjury in the case of U.S. v. Bernardo Negrón, et al., Criminal No. 00-660 USDC for the District of Puerto Rico. Pet. App. 260A-261A.[1] Among those indicted were several of CRIM's top executives, including Mr. Eduardo Burgos (Pet. App. 273A-277A); Ms. Margarita Sanfeliz Wu, a CRIM consultant (Pet. App. 279A-285A); Mr. Bernardo Negrón, President of CRIM's Board of Governors at the time that the LIMS contract was awarded to the Consortium and subsequently subscribed by CRIM (Pet. App. 288A-291A); Ms. Cándida Rodríguez, CRIM's Assistant Director (Pet. App. 301A-303-A), and Wanda Rodríguez, CRIM's Director of Finance(Pet. App. 267A). The Consortium's principals were also indicted, among them petitioner Tommy Habibe Arias, Sr., who is a principal for and represented Entec in the execution of the LIMS contract (Pet. App. 296A-297A), his son Tommy Habibe Vargas, Jr. (Pet. App. 298A-299A) and John P. Stephens, principal for Héctor L. Rivas & Associates (Pet. App. 300A-301A).

Eventually, all CRIM officials and consultants who participated in the conspiracy pleaded guilty to a variety of felony charges in U.S. v. Bernardo

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[1] Although it states in the cited pages of the Petioners' Appendix that the federal indicment was issued on August 2002, this is a typographical mistake stemming from the original document translated therein. The actual date of the indicment was August 8, 2000, something that this Court can take judicial notice from the record in U.S. v. Bernardo Negrón, et al., Crim. No. 00-660 (HL) (D.P.R. 2000).

Negrón, et al., Crim. No. 00-660 USDC. Pet. App. 262A-266A. The criminal conspiracy that the CRIM officials and consultants plead guilty to, commenced prior to and included, among other: (1) drafting the LIMS Request for Proposal and contract, including its arbitration clause and its specifications; (2) its subsequent award to the Consortium; and, (3) the disbursement of more than $50 million of public funds to the Consortium pursuant to a fraudulent scheme of approval of certificates for payment. *See* Pet. App. 272A-314A. As part of their guilty plea, these public officials admitted receiving substantial amounts of money, luxury items and favors from the Consortium principals. *See* id.

Tommy Habibe Arias, Sr., Tommy Habibe Vargas, Jr., John P. Stephens, principals of the corporations that executed the LIMS contract, also pleaded guilty to felony charges while admitting their participation in the above described criminal conspiracy. Pet. App. 265A-266A. Other persons who cooperated in the kickback and laundering of public funds, or committed perjury during the grand jury's investigation of the events, also pled guilty to a variety of felony charges. Pet. App. 268A-271A. Mr. Héctor L. Rivas, principal of Héctor L. Rivas & Associates, was never arrested since, allegedly, he fled to Cuba before the indictment was issued. Nevertheless, on November 18, 1996, Entec contractually assumed Héctor L. Rivas & Associates' obligations, responsibilities and compensation in the $56 million dollar LIMS contract. *See* Pet. App. 7B-8B. Thus, Habibe Sr. and Habibe, Jr., through their companies and the

agreement with Héctor L. Rivas & Associates, contractually bound themselves and became solely responsible to CRIM for the obligations related to the LIMS contract.

The LIMS contract had an arbitration clause establishing that "[a]ll disputes, controversies and questions that may arise under this Agreement shall be resolved by arbitration conducted in Puerto Rico . . . ." Pet. App. 77B-78B. In September, 2000, one month after the Grand Jury issued its indictment against CRIM officials and the principals of the Consortium, the Consortium filed in New York a Demand for Arbitration for collection of money alleging breach of contract and damages for libel and loss of business opportunities. Pet. App. 474B. In December, 2000, represented by attorneys that had been retained by CRIM during Mr. Burgos' incumbency, CRIM responded by filing a "Statement of Defense" with the AAA. Pet. App. 301B. On March 20, 2001, Mr. Eduardo Burgos, CRIM's Executive Director when the LIMS contract was negotiated and executed, pled guilty in U.S. v. Bernardo Negrón, supra, to violations of 18 U.S.C. 1951 (interference with commerce through extortion), sec. 1956 and 1957 (both related to "involvement in monetary transactions with property derived from criminal activities"). Pet. App. 23B-24B. The following day, on March 21, 2001, a panel consisting of three arbitrators was designated. Pet. App. 86B.

In May, 2001, upon the appointment of a new Executive Director and a new Board of Governors, CRIM retained new counsel and

proceeded to amend its answer before the arbitration panel, questioning the panel's jurisdiction, requesting a stay of the arbitration proceedings, and citing, among other, the August, 2000 indictment and Mr. Burgos' March 20, 2001 guilty plea to the federal charges. Pet. App. 81B and 124B-127B. This challenge to the arbitration proceedings and the remedy for stay was denied by the panel which proceeded to issue a scheduling order that included the establishment of a full litigation calendar leading up to an arbitration hearing. Id.

Thereafter, CRIM filed a complaint before the Commonwealth's CFI requesting, among other, the issuance of a preliminary and permanent injunction to bar the Consortium from continuing the arbitration proceeding, requesting the CFI to declare the nullity *ab initio* of the LIMS contract and its arbitration clause because they were illegal, lacked consent as they were authorized *ultra vires*, lacked cause under Puerto Rico's civil law tradition contractual requirements, and also because of the nullity of CRIM's consent (provided through its corrupt agents) to conclude the contract. The complaint also sought the collection of the monies defrauded from the agency. Pet. App. 1B-73B. After several procedural events the CFI issued the preliminary injunction ordering the Consortium entities to abstain from continuing the arbitration proceeding until the validity of the LIMS contract was determined. Pet. App. 201A. The CFI also ruled against petitioners' argument that it lacked jurisdiction over the controversies related to the

LIMS contract because said agreement had an arbitration clause. *See* Pet. App. 176A-181A and 185A-194A.

Petitioners unsuccessfully appealed the preliminary injunction issued by the CFI as it was upheld by Puerto Rico's intermediate court of appeals. The CFI's jurisdiction was also affirmed. Pet. App. 202A-274A. Petitioners failed to request a writ of certiorari of this interim ruling to the Supreme Court of Puerto Rico. The litigation was remanded to the CFI and, eventually, CRIM sought a summary judgment declaring the LIMS contract null *ab initio*, a permanent injunction as to the arbitration proceeding and that the money paid by CRIM to the Consortium, as per the LIMS contract, be returned to CRIM. Petitioners never opposed CRIM's summary judgment's request. Pet. App. 258A. The CFI ultimately declared the LIMS contract null *ab initio*, the arbitration clause null, issued the permanent injunction and ordered the Consortium to return to CRIM the monies fraudulently disbursed to it. Pet. App. 355A-356A. This December 7, 2005 judgment, notified by the Clerk of the CFI to the parties on December 13, 2005, was specifically adjudged final by the CFI by virtue of the provisions of Puerto Rico Rule of Civil Procedure 43.5, upon an express finding that there was no reason to postpone the issuance of the judgment rendered until the complete resolution of all other issues in the litigation and further ordering that the judgment issued should be registered. Pet. App. 358A; 32 L.P.R.A. Ap. III R. 43.5.

Instead of appealing said judgment, within the 30-day time period provided by Puerto Rico's Rules of Civil Procedure, on December 23, 2005 the petitioners filed a "Request for Additional Findings of Fact and Legal Conclusions" before the CFI purportedly as provided by Local Civil Procedure Rule 43.3, 32 L.P.R.A. Ap. III R. 43.3. Pet. App. 9A. Subsequently, on January 12, 2006, Petitioners filed before the CFI a belated "Motion for Reconsideration". Pet. App. 40A.

Under the Rules of Civil Procedure of Puerto Rico that govern post-judgment proceedings and/or remedies, there are several jurisdictional pitfalls that can adversely affect the availability of an eventual appeal if a party opts first to seek additional procedural remedies before the court of first instance and does so without properly observing the substantive requirements of the rules (e.g.; requests for additional findings of fact and/or motions for reconsideration). Specifically, since 1997 it has been established law in Puerto Rico, that in order to toll the jurisdictional time period to request reconsideration of a final judgment under Puerto Rico Civil Procedure Rule 47, 32 L.P.R.A. App. III R. 47, and the 30-day jurisdictional time period to appeal under Rule 53.1, 32 L.P.R.A. App. III, Rule 53.1, a motion for additional findings of facts and conclusions of law pursuant to Rule 43.3, must comply with well established and reasoned requirements that in essence seek to prevent parties from abusing the rule and delaying the proceedings by attempting to toll the appellate time periods with the filing of perfunctory motions under said rule. The party that thus moves faces

the risk of filing outside the jurisdictional time period and being unable to seek appellate review. *See* Andino v. Topeka, Inc., 142 D.P.R. 933 (1997). Pet. App. 17A-21A.

As it will be detailed herein, this is precisely what occurred in the case now before this Court. Upon careful consideration of Petitioners' motion under local Rule of Civil Procedure 43.3, the CFI concluded that it did not comply with the requirements of the rule. As a consequence, petitioners lost their jurisdictional window to appeal before the Puerto Rico Court of Appeals, thus rendering the CFI judgment final and unappealable be it before the Puerto Rico Court of Appeals, the Puerto Rico Supreme Court or this Court.

The CFI meticulously examined petitioners' request for additional findings of fact and conclusions of law. Pet. App. 17A-32A. In its resolution denying said motion, the court of first instance found that petitioners' Rule 43.3 motion did "not meet . . . the forensic practice" requirements, "as outlined by the Supreme Court in Andino v. Topeka, supra." Pet. App. 25A. Thus, petitioners' motion for additional findings of fact and legal conclusions failed to toll the 15-day jurisdictional term for the filing of a motion for reconsideration under Puerto Rico's Rules of Civil Procedure. Consequently, the subsequent filing by petitioners of a request for reconsideration was considered as filed outside the jurisdictional period

to do so and ruled "academic",[2] that is, denied as moot. Pet. App. 32A.

Dissatisfied, petitioners attempted to appeal before Puerto Rico's intermediate court of appeals. As it was to be expected, given the superficiality of petitioners' motion pursuant to Rule 43.3, said court denied petitioners' request for appeal for lack of jurisdiction, in light of the fact that the jurisdictional period to file the appeal had already expired, since January 12, 2006.[3] Petitioners' appeal request was filed almost twenty (20) months later, in August 23, 2007,[4] due to the fact that their motion for additional findings of fact and conclusions of law did not toll the jurisdictional 30-day term to appeal. Pet. App. 127A. Evidently, if the CFI judgment became final and unappealable on January 12, 2006, then petitioners' belated motion to overrule for lack of jurisdiction grounded on the Buckeye opinion was filed in an already closed case, when presented on May 30, 2006. Finally, the Supreme Court of Puerto Rico denied petitioners' request for Certiorari. Pet. App. 136A-140A.

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[2] The translation supplied by petitioners erroneously refers to the term "académico" in Spanish as "academic", when in fact the correct translation in the legal context for such word is "moot".

[3] *See* Appendix 128A (due to what is clearly a typographical error the translation provided therein refers to "January 23, 2006" when it should have been "January 12, 2006" which is the correct translation of "12 de enero de 2006").

[4] Id.

REASONS FOR DENYING THE PETITION

A. The judgment of the CFI became final and unappealable before this Court's ruling in Buckeye and any attempt to review it is barred by *res judicata*

The issues presented in this Petition essentially question the final and unappealable judgment rendered by the CFI previous to this Court's decision in Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006). There, the CFI ruled that the Commonwealth's courts had jurisdiction to decide the questions raised by CRIM in relation to the LIMS contract, in spite of the fact that said contract had an arbitration clause. However, as already detailed in our Statement of Facts, petitioners failed to have the judgment corrected on appeal because said request was not timely filed.

The decision in Buckeye does not render inapplicable the principles of *res judicata* where there has been a prior determination of a jurisdictional issue from which no appeal was taken. See, Reynoldsville Casket Co. v. Hyde, 514 U.S. 749, 758 (1995) ("[n]ew legal principles, even when applied retroactively, do not apply to cases already closed.") Once a suit is barred by *res judicata* a new rule cannot open the already closed case. Harper v. Virginia Dept. of Taxation, 509 U.S. 86 (1993) (a new rule of civil law applies retroactively to all civil cases on direct review or those not yet final if the ruling is applied to the parties in the case in which the rule is announced).

It is a well settled rule that *res judicata* principles apply to jurisdictional determinations regarding subject matter jurisdiction such as the ones belatedly raised by petitioners in the instant matter. Stoll v. Gottlieb, 305 U.S. 165 (1938); Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940). This Court has long recognized the "[public] policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be forever settled between the parties." Baldwin v. Traveling Men's Assn., 283 U.S. 522, 525 (1931).

The predicament in which petitioners find themselves is of their own making since they neglected to timely appeal the judgment rendered. An alleged mistake in the rendition of a judgment does not bar the application of *res judicata*. It has long been established that an erroneous judgment is as binding as a correct one if no appeal is taken from it. Hubbell v. United States, 171 U.S. 203, 308 (1898).

Petitioners are certainly correct when they point out that jurisdictional questions may be raised at any time during the proceedings. *See* Petition, at p. 6. However, when the proceedings have ended, and a case is final and unappealable, there are no available procedural resources to question neither the merits nor the jurisdiction of the court that entertained the matter. Such are the circumstances for petitioners herein, where proceedings ended thirty days after the judgment of the CFI was notified on December

13, 2005. Pet. App. 248A-360A. As pointed out by Puerto Rico's intermediate Court of Appeals in their resolution denying, for lack of subject matter jurisdiction, an otherwise mandatory review on appeal: Petitioners had until January 12, 2006 to appeal and they did not do so. Appendix 128A and n.2 of this Opposition, supra; *see also* 32 L.P.R.A. App. III R. 53.1.

B. There is no final judgment rendered by the Supreme Court of Puerto Rico subject to review of this Court as the matter became final and unappealable on January 12, 2006

Congress granted this Court jurisdiction to review "[f]inal judgments rendered by the Supreme Court of the Commonwealth of Puerto Rico . . . ." by writ of certiorari in the particular situations included in 28 U.S.C. § 1258. However, as explained at length in our Statement of Facts herein, petitioners failed to timely appeal to the Commonwealth's intermediate Court of Appeals and, consequently, it ruled that it had no jurisdiction to consider the appeal. Pet. App. 99A-131-A. The Court of Appeals specifically held that petitioners' failure to file within the jurisdictional period to appeal, "deprives us of jurisdiction . . . ." Pet. App. 117-8A.

In this situation, the judgment of the Supreme Court denying the writ of certiorari filed by petitioners, is not "a final judgment or decree rendered by the Supreme Court of the Commonwealth of Puerto Rico," which may be reviewed by this Court pursuant to 28 U.S.C. § 1258.

Federación de Maestros de Puerto Rico v. Junta de Relaciones del Trabajo de Puerto Rico, 410 F.3d 17, 19 (1st Cir. 2005) (if a lower state court issues a judgment and the losing party allows the time to appeal to expire, such a judgment is not a 'final judgment [ ] or decree [ ] rendered by the highest court of a state . . . under [28 U.S.C.] § 1257", equivalent to § 1258 for the Supreme Court of Puerto Rico).[5] Having failed, through their own volition, to secure a final judgment from the Supreme Court of Puerto Rico, this Court lacks jurisdiction to entertain this petition. Hammerstein v. Superior Court, 341 U.S. 491, 492 (1951) (Supreme Court lacks jurisdiction if petitioner failed to "utilize the proper channel of review, namely, . . . failure to appeal from default judgment").

Finally, but not less important, it is worth noting that Buckeye, 546 U.S. 440, did not address the issue of whether an agreement was ever concluded between the parties. Buckeye, 546 U.S. at 444, n. 1. In the instant case, the CFI declared CRIM's agents actions in relation to the LIMS contract "null and *ultra vires*" (Pet. App. 336A) and the Supreme Court of Puerto Rico has defined *ultra vires* actions are those "acts or businesses conducted in excess of the authority . . . vested." Soto Vázquez v. Rivera Alvarado, 144 D.P.R. 500, 514 n. 2 (1997) (translation supplied). *See also* Pet. App. 336A.

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[5] As in Federación, 410 F.3d 17, the differences between 28 U.S.C. secs. 1257 and 1258 are not relevant to the issues discussed herein. Federación, 410 F.3d at 21 n. 6.

In sum, because the judgment of the CFI became final and unappealable before this Court's ruling in Buckeye, and there is no final judgment rendered by the Supreme Court of Puerto Rico subject to review of this Court, this is not a proper case for the issuance of a writ of certiorari.

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CONCLUSION

Petitioners have not established any compelling reason for this Court to grant the Petition and, in fact, there is none. Respondents therefore respectfully request that the Petition be denied.

Respectfully submitted,

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